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IN THE

Supreme Court of the United States

October Term, 1961

No. 272

C. A. PAGE PUBLISHING CO., INC., a corporation,
Petitioner,

vs.

TELFORD WORK, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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Opinions Below

The opinion of the District Court (App. A of Petition) is reported at 178 Fed. Supp. 184. The opinions of the Court of Appeals for the Ninth Circuit on Petitioner's appeal (App. B of Petition) and denying Petition for Rehearing (App. C of Petition) are officially reported in 290 Fed. 2d Adv. Sheets 334, and are unofficially reported in C.C.H. 1961 Trade Cases, ¶69,956, p. 77,812 and ¶70,014, p. 78,016, respectively.

Jurisdiction

The general jurisdictional requisites for a Petition are set forth in the Petition; however, there is no Federal Jurisdiction under the antitrust laws in this case. The alleged activities in the local *intrastate* market of printing and publishing the delinquent tax list of Los Angeles County, California, do not directly or substantially affect or tend to monopolize any interstate commerce in which the parties engage.

Questions Presented

The Petition tenders five unintelligible and academic questions not expressed in the terms and circumstances of this case. The questions presented in the Petition do not apprise the Court or Respondents of the issues which Petitioner is seeking to have reviewed, but indicate rather a misconstruction of the opinions of the Courts below and the principles of law therein stated.

The real questions presented in this case involve well-established principles of antitrust law not requiring review by this Court and are as follows:

1. Whether there is Federal Jurisdiction under antitrust laws where trade and commerce between the states is not involved in or affected by the alleged activities of Respondent with relation to the printing and publishing of the delinquent tax list of Los Angeles County, the *intrastate* activity which is the subject matter of this action?
2. Whether Petitioner can invoke §7 of the Clayton Act (Title 15, §18, U.S.C.) by reason of the

acquisition by Respondent Newspaper Publishers, through a corporate agency, of individually owned assets of a legal newspaper in which Petitioner was not interested, financially or otherwise, and claims no loss from such acquisition, where such acquisition did not lessen competition, or monopolize or tend to monopolize the interstate trade and commerce in which Petitioner is engaged?

3. Whether Petitioner can complain of a deprivation of a jury trial where there exists no genuine issue as to any fact material to the question of Federal Jurisdiction and Summary Judgment dismissing the action was granted as a matter of law?

Statutes and Rules Involved

The provisions of the Constitution, Statutes and Rules on which Petitioner relies are set forth in the Petition at pp. 3-5. Petitioner has omitted from the Petition Rule 56(a) of the Federal Rules of Civil Procedure invoked by Petitioner in Petitioner's Cross-Motion for Summary Judgment in the District Court on the question of Federal Jurisdiction under the Antitrust Laws. [R 285] The pertinent provisions of said Rule 56(a) are as follows:

> "A party seeking to recover upon a claim, counter-claim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with

or without supporting affidavits for a summary judgment in his favor upon all or any part thereof."

STATEMENT

Respondents' Motion for Summary Judgment in the District Court was granted and the action was dismissed upon the ground that there was no Federal Jurisdiction to award damages in this Civil Antitrust action, involving only the local *intrastate activity* of publication of the delinquent tax lists of Los Angeles County in the years 1952 and 1955. Based upon the undisputed facts, the District Court found that there was no direct or substantial effect or interference with any interstate trade or commerce in which the parties engaged in their respective businesses.

The Petition does not reflect the fact that Petitioner also joined in requesting the District Court to determine the question of Federal Jurisdiction in a Counter-Motion for Summary Judgment [R. 285-307], accompanied by a proposed form of Partial Summary Judgment "removing from the jury's consideration the question of interstate commerce and the question of jurisdiction." [R. 307] Petitioner's Cross-Motion was denied in the Order for Summary Judgment dismissing the action for lack of Federal Jurisdiction. [R. 409]

Petitioner did not raise any genuine issue on the material facts which Respondents set forth in their Motion as determinative of the question of Federal Jurisdiction [R. 131-139] but Petitioner rested its opposition and its Counter-Motion upon an erroneous concept of law concerning the basis for Federal Jur-

isdiction under the Sherman and Clayton Acts, contending in that regard that the test of Federal Jurisdiction under the antitrust laws is whether the parties are engaged in interstate commerce and urging that a different set of facts is determinative of the question of Federal Jurisdiction.

The Courts below found that this case and the Marietta Page case (No. 271) "raise the identical jurisdictional issues". The District Court disposed of both cases in one opinion. [178 F. Supp. 184] The Court of Appeals wrote a separate opinion in this case referring to the Marietta Page case for the recital of background and historical material concerning Respondents. [290 F. 2d Adv. Sh. 334]

Petitioner concedes that there are distinctions between the two cases. [Pet. p. 7] The relevant market or subject matter and basis of claimed loss in this case is different from the relevant market and basis for claim of loss in the Marietta Page case. Also in this case Petitioner seeks an injunction against alleged activities of Respondents, as claimed in the original complaint [R. 21-22] except that the allegations regarding divestiture were admittedly stricken from the complaint. [Pet. p. 7] The Court of Appeals also points out distinctions between the two cases in the charges concerning condemned activities. [290 F. 2d, at p. 335]

The "Statement of the Case" in the Petition does not contain a recital of facts sufficient to acquaint this Court with the subject matter of this action and the material facts of this case on which the District Court Judgment and the decision of the Court of Appeals rest. Respondents therefore set forth herein a state-

ment of facts material to the consideration of the questions presented in this case:

Statement of Facts

This private action for treble damages and injunction (originally filed August 5, 1952 and supplemented June 9, 1958) is based upon claimed loss of two items of public legal advertising of Los Angeles County consisting of:

1) 1951 delinquent tax list published in 1952; and

2) 1954 delinquent tax list published in 1955 (claimed in the Supplemental Complaint).

Petitioner claims no other losses in this action. [Admitted Facts, '74, R. 85] Petitioner (incorporated June, 1938) is the publisher of the Commercial News, a *business newspaper* not primarily in the legal publication field, publishing little private legal advertising, and insignificant and sporadic amounts of public legal advertising (one item in nine years). Petitioner makes no claim of loss of such advertising. [Admitted Facts, §9, 15 and 73, R. 66, 67, and 85; R. 183]

It is conceded by Petitioner that all of the newspaper Respondents were "community newspapers" serving small neighborhoods in and around Los Angeles, as distinguished from the Metropolitan papers in the City of Los Angeles. Some of Respondents were no longer in business and some of the newspapers previously published were no longer being published at the time of the 1955 publication of the delinquent tax list of Los Angeles County. [R. 47-51] Each of the Respondent newspapers had been judicially adjudi-

cated by the courts of the State of California in and for the Los Angeles County to be a newspaper of general circulation, thereby qualified to publish legal advertising in Los Angeles County. [Admitted Facts, ¶1, R. 64]

The historical background and activities of Respondent, Los Angeles Newspaper Service Bureau, Inc. (hereinafter referred to as Bureau) are set forth in the Statement of Facts in the Marietta Page case (No. 271) and for the sake of brevity reference is made thereto as if set forth herein. Suffice it to here state that Bureau was incorporated in 1934 to enable each of its newspaper publisher stockholders to have a downtown Civic Center representative, and each publisher individually used the services of Bureau under a separate representation agreement in connection with the solicitation, printing and publishing of private and public legal advertising. Bureau did not publish any legal advertising. [Admitted Facts, ¶75, R. 85]

Bureau owns all of the stock of Mutual Newspaper Publishing Company, (hereinafter referred to as "Mutual") the publisher of the Los Angeles Daily Journal. [Admitted Facts, ¶21 and 22, R. 69] All of the stockholders of Bureau were not joined as parties defendant in this action. [Admitted Facts, ¶17, R. 69]

Re: Relevant Market Involved

This case involves only the publication of the delinquent tax lists of Los Angeles County in the years 1952 and 1955 under contract with the County of Los Angeles pursuant to the provisions of the Revenue and Taxation Code of California then in effect. This

type of legal advertising is distinct not only from display and classified advertising but from other types of legal advertising, in purpose, size, volume, specifications, infrequency of publication, price, costs and financial requirements. The publication of the delinquent tax list of Los Angeles County is not interchangeable with any other types of advertising and comprises a separate, distinct and limited "relevant market".

The Revenue and Taxation Code of California requires that the Tax Collector of each County cause to be published annually a list of the delinquent tax payers, the descriptions of their respective properties, and the respective amounts of the delinquent taxes, together with notice of time and place of Tax Sale. (Rev. & Tax Code of Cal. §3351, et seq.)

In the years 1952 and 1955, the law required that such delinquent tax list be published once a week for three successive weeks in a newspaper of general circulation *published in the county.* (Rev. & Tax Code of Cal. §3356) In order to qualify for such publication of the delinquent tax list of Los Angeles County, a newspaper must be adjudicated as a newspaper of general circulation in Los Angeles County, as defined in the Government Code of California, requiring that such newspaper must have been established, printed and published at regular intervals for at least one year in Los Angeles County. (Govt. Code of Cal. §6000, et seq.)

The publication of the delinquent tax lists of Los Angeles County in the years 1952 and 1955 was made pursuant to Requests for Bids by the County Purchasing Agent, mailed to the newspapers of general circu-

lation of Los Angeles County. [Admitted Facts, ¶35 and 56, R. 75 and 81].

Re: No Restraint or Monopoly of the Relevant Market

Each of the contracts for publication of the delinquent tax lists of Los Angeles County was awarded in the years 1952 and 1955, respectively, to the lowest bidder, by the Purchasing Agent of Los Angeles County. [Admitted Facts, ¶51 and 59, R. 79 and 81]

Petitioner's bid was the highest bid in each of said years [Admitted Facts, ¶39, 57 and 58, R. 76 and 81] Petitioner filed bids in 1952 and 1955 at the high rates of 75¢ per legal square, well-knowing that the highest award for publishing the delinquent tax list of Los Angeles County was at the rate of 42½¢ per legal square prior to 1952, and at the rate of 46¢ per legal square prior to 1955. [Admitted Facts, ¶32, R. 74; R. 188]

In 1952 it would have cost the County of Los Angeles $109,281 for the 1952 publication of the delinquent tax list if the contract had been awarded to Petitioner on its high bid, as compared with the amount paid to the successful low bidder in the sum of $52,384. [Admitted Facts, ¶52 and 54, R. 79 and 80] It would have cost the County of Los Angeles $119,864 for the 1955 publication of the delinquent tax list if the contract had been awarded to Petitioner on its high bid, as compared with the amount paid to the successful low bidder in the sum of $75,814. [Admitted Facts, ¶60 and 62, R. 82 and 83]

Petitioner's estimate of the production cost of publishing said delinquent tax list in 1952 by the planned

offset method, if the contract had been awarded to Petitioner, was $23,590; the production cost of composing and printing the said delinquent tax list in 1952 by the successful bidder was approximately $25,000. [Admitted Facts ¶55, R. 80-81; R. 194, 197] Petitioner's estimate of production cost of composing and printing said delinquent tax list by offset method in 1955, if the contract had been awarded to Petitioner was $23,590; the production cost of composing and printing said delinquent tax list in 1955 by the successful bidder was approximately $29,680. [Admitted Facts, ¶63, R. 83]

The activities of Petitioner in making its bids on public legal advertising were not restrained or curtailed by the Respondents, or any of them. [Admitted Facts, ¶37, R. 75-76, R. 192-193] The bidding was competitive. The bids were taken by the Purchasing Agent of Los Angeles County in accordance with well established competitive bidding practices. None of the Respondents had any control over the awarding of the bids. [R. 202-3] Petitioner was not restrained in the submission of any bid. Petitioner could have submitted a bid lower than the bids on which the contracts were awarded and made a larger profit than the successful bidder, as Petitioner's estimated cost was lower than the cost of the successful bidder in each instance. [Admitted Facts, R. 75-76; R. 192-193]

Petitioner never published the delinquent tax list of Los Angeles County [Admitted Facts, ¶27, R. 73] In 1942 and 1943, contracts for publication of the delinquent tax list of Los Angeles County were awarded to Petitioner as the lowest bidder. The contracts awarded to Petitioner were assigned by Petitioner in 1942

and 1943, to Consolidated Printing and Publishing Co. (hereinafter referred to as "Consolidated") and said delinquent tax lists were published by Consolidated in 1942 and 1943 and were not published in Petitioner's newspaper, the Commercial News. [Admitted Facts, ¶30, R. 73-74] Commercial News never set type for Consolidated in connection with Consolidated's publication of the delinquent tax list in any year. [Admitted Facts, ¶68, R. 84]

Re: No Restraint or Monopoly of Any Interstate Commerce

Included in Petitioner's estimate for cost of publishing the delinquent tax list in 1952 was an estimated amount of $2424 for newsprint: and an estimated amount of $2500 for cost of newsprint for publishing the delinquent tax list in 1955. [Admitted Facts, ¶55 and 63, R. 81 and 83] Securing newsprint sufficient to publish the delinquent tax lists if the contracts had been awarded to Petitioner posed no problem for Petitioner as Petitioner had the newsprint available either in the warehouse or available from its supplier. [Item 17, R. 195]

Petitioner was not engaged in competition with Respondents, or any of them, in any interstate activity. Petitioner claims no loss of subscriptions, either within the state or outside of California; no loss of display advertising, classified advertising, or private legal advertising. Petitioner makes no claim that it was restrained or excluded from acquiring news, wire service, photocopy service, newsprint, newspaper equipment and supplies, or any of the other items upon

which Petitioner based its claim of interstate commerce in this case. [R. 175-178]

Findings of Fact and Decisions of Lower Courts

The District Court found that the alleged loss of the delinquent tax list contracts did not threaten the normal operation of the Commercial News, a newspaper of general circulation neither primarily devoted to, nor economically dependent on legal advertising; and although the Commercial News carried substantial amounts of national news and display advertising, there was no interference with the flow of such news and advertising to Commercial News readers. [R. 401]

The District Court also found that there exists no "appreciable interstate market for Los Angeles legal advertising or a Los Angeles market for legal advertisements placed by out-of-state clients". [R. 408]

The District Court also assumed that the Petitioner and Respondent newspapers are engaged in interstate commerce by virtue of (1) their regular purchases of newsprint from sources outside of California, (2) their carriage of some national news and feature items, (3) their carriage of some national advertising, and (4) a *few* out-of-state subscribers. [R. 398]

The District Court also found that no showing was, or could have been made, that respondents had any control or potential control over the interstate markets for newsprint, national display advertising, or dissemination of news. [R. 407]

The District Court found and concluded that the market involved in this case is an *intrastate activity*

which is not in trade or commerce between the states; that the interstate trade and commerce in which the parties engaged did not suffer any anti-competitive effects from the acts of Respondents of which Petitioner complains; and that the activities of Respondents with relation to legal advertising did not have any anti-competitive effect on any interstate commerce, and there is no jurisdiction of the Federal Court in this case under the antitrust laws. [R. 408]

No error in such findings and conclusions based upon undisputed facts in this case was shown by Petitioner on appeal to the Court of Appeals. The Court of Appeals affirmed the District Court's Judgment dismissing the action for lack of Federal Jurisdiction, stating, among other facts, that "The Los Angeles County delinquent tax list never enters the flow of interstate commerce, just as no other single item of public or private legal advertising published in Los Angeles County ever enters the flow of interstate commerce" [290 F. 2d at p. 336]; and that competition in the interstate activities of newsprint purchase, commercial and display advertising, news dissemination, and out-of-state circulation was not substantially affected, if affected at all, by the unsuccessful bid of Commercial News for the Los Angeles Delinquent Tax List. [290 F. 2d at p. 337]

ARGUMENT

Petitioner incorporates by reference to the Petition in the Marietta Page case, No. 271, the statement of "reasons for granting the Writ", asserting that "the jurisdictional issue is identical in this case". [Pet. p. 8] Without conceding the relevancy or materiality

thereof, for the sake of brevity, in so far as the arguments and contentions in the Petition in the Marietta Page case are incorporated by reference in the Petition in this case, Respondents incorporate herein by reference the arguments and points made in the Brief for Respondents in Opposition thereto.

The market or field of activity which is the subject matter of this civil antitrust action for damages is the *local intrastate market* of printing and publishing the delinquent tax lists of Los Angeles County, which is an even narrower and more limited field of activity than the local activity of legal advertising in Los Angeles County, the intrastate market involved in the Marietta Page case. Admittedly, Petitioner's only claim of loss in this action is based upon claimed loss of the two delinquent tax lists of Los Angeles County, published in 1952 and 1955, respectively. The instant case does not involve any competition in the publication of "private legal advertising" as Petitioner claims no loss of "private legal advertising". [Admitted Facts, ¶73, R. 85] Based upon undisputed facts, the District Court found that the Commercial News (Petitioner's newspaper) is "neither primarily devoted to, nor economically dependent upon legal advertising," and that the loss of the delinquent tax list contracts was not claimed to have threatened the normal operation of the Commercial News. [App. A of Pet. p. 6]

Petitioner contends that the Court of Appeals erroneously stated in its separate opinion in this case that "The Los Angeles County delinquent tax list never enters the flow of interstate commerce, just as no other single item of public or private legal ad-

vertising published in Los Angeles County ever enters the flow of interstate commerce", urging as the basis for claimed error, that "the County delinquent tax list is circulated to every subscriber of a newspaper publishing the same which means that it must go to the newspapers' out-of-state subscribers." [Pet. p. 9]

The incidental circulation of the publication of the tax list, as a special unique ingredient of three issues of the newspaper publishing the tax list, to its few out-of-state subscribers, comes within the maxim "*de minimus*", and does not constitute the "trade and commerce between the states" which the antitrust laws are designed to protect.

The publication of the delinquent tax list of Los Angeles County must be made in a newspaper of general circulation in Los Angeles County. (Gov. Code of Cal. §6040) The successful bidder to whom the contract for printing and publishing the delinquent tax list of Los Angeles County is awarded is only required to publish that public legal notice in Los Angeles County and not elsewhere. In order to publish such delinquent tax list, the newspaper must be qualified for that purpose as a newspaper of general circulation in Los Angeles County under the provisions of §6000, et seq. of the Government Code of California. The New York Times, The San Francisco Chronicle, or any other out-of-state or out-of-county newspaper, though circulated in Los Angeles County, would not qualify to publish the delinquent tax list of Los Angeles County, as such papers would not meet the statutory requirements of being established, printed, published and adjudicated as a "newspaper of general circulation" in Los Angeles County.

Inasmuch as the publication of the delinquent tax list of Los Angeles County is confined by law to the locale of Los Angeles County, there is no genuine issue that such "relevant market" is a purely local intrastate activity and not in the "stream" or "flow" of "trade or commerce between the states". The spurious contention of Petitioner to the contrary does not raise a genuine issue and cannot convert the limited activity of publication of the delinquent tax list of Los Angeles County to "trade and commerce between the states".

Recognizing the vacuity of such contention, Petitioner urges that "even were the prohibited activities limited to an intrastate phase of the defendants' below business, those activities are included within the scope of the anti-trust laws under the decision of this Court in *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115." [Pet. p. 10] The cited case involved discrimination in prices of products sold in interstate commerce in violation of Section 3 of the Robinson-Patman Act (15 U.S.C. §13a) In reciting the facts in the cited case, this Court noted that the respondent is engaged in commerce, "selling bread both locally and interstate" and "in the course of such business, it made price discrimination, maintaining the price in the interstate transactions and cutting the price in the intrastate sales." The cited case is not applicable to the facts in the case at bar.

In the instant case, there is no competition between the parties in the interstate activities in which the parties are engaged. Petitioner claims no loss of subscriptions, either within or without the State of California. [R. 175-176] It is obvious that Petitioner's

out-of-state subscriptions were not based upon the expectation of receiving a copy of the delinquent tax list of Los Angeles County as Petitioner never published the delinquent tax list [Admitted Facts, ¶27, R. 73] and Petitioner lost no subscribers on that account.

Petitioner claims no loss of display advertising, classified advertising, or private legal advertising, or even public legal advertising other than the *two delinquent tax lists* on which Petitioner filed competitive bids in 1952 and 1955. Petitioner makes no claim that it was restrained or excluded from acquiring news, wire service, photocopy service, newsprint, newspaper equipment and supplies, or any of the other items upon which Petitioner bases its claim of interstate commerce in this case. [R. 173-181] Neither the source of supply nor the price of any of said supplies or activities was controlled by Respondents, or any of them. There was no interference with the manufacture or transmitting in interstate commerce of any of such supplies and services. Petitioner claims no discrimination against it in the acquiring of any newsprint or other supplies or services from out-of-state. [R. 195]

There was no area of competition between the Commercial News and the Respondent Newspapers except the bidding for the printing and publishing of the delinquent tax lists of Los Angeles County, admittedly the relevant market in this case. Petitioner was not deprived of any competitive opportunity by Respondents in connection with the bidding for publication of said delinquent tax lists and was not restrained. Petitioner suffered no injury to its business or prop-

erty by reason of anything forbidden in the antitrust laws. The charges of conspiracy, collusive bidding, and all of the alleged overt acts and alleged *per se* violations, which did not give rise to Petitioner's claim of loss or injury, are not relevant or material to the question of Federal Jurisdiction.

Petitioner charges Respondents with a conspiracy wholly unrelated to the two items of loss claimed by Petitioner based upon the 1952 and 1955 bidding for and publication of the delinquent tax lists of Los Angeles County. Admittedly Petitioner was not restrained from filing any bid that Petitioner in its sole discretion, desired to file. [Admitted Facts, ¶37, R. 75-76] Petitioner was not compelled by higher production costs to enter a high bid. As hereinabove shown, in the statement of facts, Petitioner's estimated costs of production by the offset method of printing which Petitioner planned to use when it entered its said bids, was lower than the actual cost of production under the contracts awarded to the successful bidders. [Admitted Facts, ¶55 and 63, R. 80-81 and 83]

It is clear that Petitioner is merely in the position of an unsuccessful bidder. The bids for the publication of the delinquent tax lists of Los Angeles County were taken by the Purchasing Agent of Los Angeles County in accordance with the usual competitive bidding practices. It is not contended that Respondents had any control over the awarding of the contracts on the bids submitted. Petitioner's high bids and not the activities of Respondents prevented Petitioner from receiving the award of the contracts. Petitioner is merely a disgruntled bidder. Petitioner cannot demonstrate that any interstate trade or commerce was re-

strained or monopolized, or potentially monopolized, or in fact involved in this action.

The Courts below correctly held that the effect on Commercial News of its unsuccessful bids for the Los Angeles County delinquent tax list did not affect interstate commerce. There is no basis in fact or error in law warranting a review of this case by this Court.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that there is no ground for review of the decision below turning upon the special facts of this case, and this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September 8, 1961.